

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the United Wisconsin
Insurance Company, American Medical
Security, and United Wisconsin Life
Insurance Company

**RECOMMENDATION ON
CROSS-MOTIONS FOR
SUMMARY DISPOSITION
AND OTHER MATTERS**

A hearing was held in the above-entitled matter before Administrative Law Judge Steve M. Mihalchick on the cross-motions of the parties for summary disposition on various counts and motions regarding other issues. The hearing was held at the Office of Administrative Hearings, Minneapolis, Minnesota, on June 14, 1999. The record on the motion closed upon the close of the hearing.

Steven K. Warch, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130 appeared on behalf of the Department of Commerce (Department). Christopher W. Madel, Withrop & Weinstine, 3000 Dain Bosworth Plaza, 60 South Sixth St., Minneapolis, MN 55402 and Kaitlin A. Hallett, Winthrop & Wienstine,, 3200 Minnesota World Trade Center, 30 East Seventh Street, Saint Paul, Minnesota 55101, appeared on behalf of United Wisconsin Insurance Company, American Medical Security, and the United Wisconsin Life Insurance Company (collectively referred to as Respondents). Tim Moore, General Counsel of American Medical Security, 3100 AMS Boulevard, P.O. Box 19032, Green Bay, Wisconsin 54307-9032, also appeared at the hearing.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Commerce order that:

1. The Department's Motion for Summary Disposition on Counts 1, 4, 7, and 10, be GRANTED
2. The Respondents' Motion for Summary Disposition on Counts 7, 8, 9, and 10, be DENIED.

ORDER

IT IS HEREBY ORDERED that:

1. The Respondents' Motion In Limine is DENIED.

2. The foregoing Recommendations are certified to the Commissioner of Commerce for final decision.
3. The remaining issues in this case are stayed indefinitely pending the Commissioner's Order on the certified issues.

Dated this 26th day of July, 1999.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gary A. Lavasseur, Deputy Commissioner, Enforcement and Licensing Divisions, 133 East Seventh Street, St. Paul, Minnesota 55101, telephone (651) 296-2594, to ascertain the procedure for filing exceptions or presenting argument.

MEMORANDUM

Based on complaints received from policyholders, the Department initiated an investigation into the business practices of the United Wisconsin Insurance Company (UWIC), American Medical Security (AMS), and the United Wisconsin Life Insurance Company (UWIC). The specific business practices complained of were charging multiple copayments for specific treatments or services covered under individual health plans and imposing a three-month waiting period for coverage of basic dental care and unapproved rate increases under Respondents' dental coverage only policy. The Department informed Respondents that the approved rates for the health and dental insurance policies at issue did not allow the multiple copayment provisions or the waiting period provisions. After discussions concerning what practices are allowable for the sale of insurance in Minnesota, the Department initiated this proceeding to sanction Respondents.

Eleven counts were brought against Respondents by the Department.^[1] Count 1 alleges separate violations of law for every individual policy of insurance issued by UWIC and AMS in Minnesota containing rates not approved by the Department. Count 2 alleges UWIC and AMS are unfit for licensure due to the issuance of those policies.

Count 3 alleges that the practices in Count 1 constitute fraudulent, coercive, or dishonest practices by UWIC and AMS.

Count 4 alleges separate violations of law for every individual policy of dental coverage only insurance issued by UWIC, UWLIC, and AMS in Minnesota containing a waiting period not approved by the Department. Count 5 alleges UWIC, UWLIC, and AMS are unfit for licensure due to the issuance of those dental policies. Count 6 alleges that the practices in Count 4 constitute fraudulent, coercive, or dishonest practices by UWIC, UWLIC, and AMS.

Count 7 alleges separate violations of law for every individual policy of dental coverage only insurance issued by UWLIC and AMS in Minnesota containing rates that had been increased without the Department's approval. Count 8 alleges UWLIC and AMS are unfit for licensure due to the issuance of the dental policies without rate approval as described in Count 7. Count 9 alleges that the practices in Count 7 constitute fraudulent, coercive, or dishonest practices by UWLIC, and AMS.

Count 10 alleges that UWIC and UWLIC provided false, misleading, or incomplete information in their annual statements for 1996 and 1997, in violation of Minn. Stat. § 45.027, subd. 7(3). Count 11 alleges AMS failed to respond or responded with misleading information to Department requests for information and thereby violated Minn. Stat. § 45.027, subds. 1a, 7(2), and 7(3).

The Department moved for summary disposition on Counts 1, 4, and 7, asserting that no material issues of fact remain for hearing that Respondents issued policies of insurance without rate approval from the Department in violation of Minn. Stat. §§ 62A.02 and 72A.13, subd. 1. Respondents moved for summary disposition on Counts 7, 8, and 9, asserting that they are entitled to dismissal of those Counts since the Department lacks the statutory authority to require rate approval for dental only coverage insurance policies. Both the Department and Respondents filed motions for summary disposition on Count 10. Respondents filed a motion to limit the evidence the Department may present to that already obtained through discovery. Respondents also moved for production of five documents that the Department claimed were privileged.^[2]

An Administrative Law Judge may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact.^[3] Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.^[4] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.^[5]

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party.^[6] All doubts and factual inferences must be resolved against the moving party.^[7] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[8] To defeat a motion for summary judgment successfully, the nonmoving party must show that

specific facts are in dispute that have a bearing on the outcome of the case.^[9] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.^[10] Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery.^[11] To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden.^[12]

Regarding Count 1, Respondents assert that the record on this motion lacks any evidence that persons in Minnesota received policies of health insurance that contain terms not approved by the Department. The Department responded that charges are supported by the information received from Respondents themselves and that no further evidence (such as calling policyholders as witnesses) is required for a resolution of this matter on summary disposition.

The Department has provided a listing of policyholders (numbering over 7300 persons) which gives the name, address, telephone number, effective date of coverage, termination date of coverage (if any), the name of the insurance plan, the type of policy (individual medical), the form number under which the policy terms are set, the monthly premium charged, and the total premiums paid.^[13] The list indicates that most policyholders have one variety or another of the so called Gold plan. In response to discovery, Respondents identified 6127 as the total of current and former policyholders insured under the Gold plan.^[14] Each version of the Gold plan provides for multiple copayments for some covered services.^[15]

When the Department inquired as to the multiple copayment language, Mary Jo Wagner, Manager of Compliance for Respondent AMS, indicated that 9,124 policies were issued in Minnesota with the multiple copayment language.^[16] The list of policyholders (provided originally by Respondents) identifies the approved form number for the plans as Form PO0003053.^[17] Form PO0003053 contains no multiple copayment provisions. Form PO0003053 was finally approved by the Department on December 27, 1991.^[18]

The evidence introduced by the Department to support its motion for summary disposition shows that the Respondents issued at least 6127 policies of health insurance in Minnesota with terms not approved by the Department as required by Minn. Stat. § 62A.02, subd. 2. The Respondents assert that some of these policyholders "might not" have received policies with the multiple copayment language. No evidence has been submitted of a single policyholder (of those identified on the list) who received a Gold plan policy without the multiple copayment language. As insurance companies operating under certificates of authority issued by the Department, Respondents have the obligation to know what is contained in their insurance policies.^[19] The nonmoving party does not meet its burden to defeat a summary disposition motion with speculation as to possible issues of fact that might arise.^[20] Respondents have had ample opportunity to identify policies actually issued to

policyholders in Minnesota that are identified as Gold plans and that lack the multiple copayment language. No such policies have been introduced. Absent genuine issues of material fact, summary disposition on Count 1 in favor of the Department is appropriate.

Regarding Counts 7, 8, and 9, Respondents assert that they are entitled to summary disposition because dental insurance is not health insurance for which filing is required under Minn. Stat. § 62A.02. The Department asserts that the statute does apply to dental plans and therefore summary disposition should be granted in the Department's favor on Counts 4 and 7. There are no disputes of fact regarding the change of terms (adding waiting periods for basic dental care before coverage begins and changing the rates without approval) in the dental insurance plan. The only dispute is a question of law, namely, whether dental coverage only policies of insurance must be filed with and approved by the Department under Minn. Stat. § 62A.02.

Respondents' assertion regarding dental insurance is based upon the language of Minn. Stat. § 62A.011, subd. 3, which states in pertinent part:

Subd. 3. **Health plan.** "Health plan" means a policy or certificate of accident and sickness insurance as defined in section 62A.01 offered by an insurance company licensed under chapter 60A; a subscriber contract or certificate offered by a nonprofit health service plan corporation operating under chapter 62C; a health maintenance contract or certificate offered by a health maintenance organization operating under chapter 62D; a health benefit certificate offered by a fraternal benefit society operating under chapter 64B; or health coverage offered by a joint self-insurance employee health plan operating under chapter 62H. Health plan means individual and group coverage, unless otherwise specified. Health plan does not include coverage that is:

* * *

(6) designed solely to provide dental or vision care;

* * * *

The Department responded that the obligation to file policies for approval with the Department attaches to every "policy of accident and sickness insurance,"^[21] and that dental insurance falls within the definition of such policies.^[22] The Department points out that under Minn. Stat. § 60A.06, subd. 1, only the types of insurance listed in the subpart are allowed to be sold in Minnesota. Thus, if dental insurance is not within the definition of "policy of accident and sickness insurance," such insurance legally cannot be offered for sale by anyone in Minnesota.

There is no need to go beyond the bounds of Minn. Stat. Chapter 62A to resolve this question. Minn. Stat. § 62A.136 states:

The following provisions do not apply to health plans providing dental or vision coverage only: sections 62A.041; 62A.047; 62A.149; 62A.151; 62A.152; 62A.154; 62A.155; 62A.21, subdivision 2b; 62A.26; 62A.28; and 62A.30.

Two conclusions can be drawn from foregoing statute. First, insurance policies for dental or vision coverage only do qualify as "health plans," despite the language contained in Minn. Stat. § 62A.011.^[23] Second, dental or vision coverage only policies are only exempt from those statutory obligations listed. The remaining requirements (including filing and rate approval contained in Minn. Stat. §§ 62A.01-.10) of the chapter apply to dental or vision coverage only policies of insurance. Therefore, as a matter of law, dental plans must be filed with the Department and rate approval obtained before issuing such plans to policy holders. Respondents do not dispute that they issued dental policies to policyholders without obtaining the approval of the Department for terms contained therein. There are no genuine issues of material fact in dispute regarding Counts 4 and 7 and the Department is entitled to summary disposition on those Counts.

The Department alleged in Amended Count 10 that Respondents UWIC and UWLIC incorrectly reported the premiums collected for individual health and insurance policies on the annual statements filed with the Department in 1996 and 1997. Respondents acknowledge that the annual statements were incorrect, but vigorously maintain that the errors are immaterial.^[24] The Department maintains that any error is sufficient to constitute a violation of Minn. Stat. § 45.027, subd. 7(3), since the statute lacks any language requiring that the false, misleading, or incomplete information be material.

Due to the nature of the erroneous information reported, the issue of whether a materiality requirement should be implied is not present here.^[25] The Respondents maintain that the total amount of misreported premiums amount to 2% and .5% of their total premiums^[26] and, therefore, the misstatements are immaterial as a matter of law. This approach ignores the effect of misreporting premiums collected from individual insured as having been collected from group insurance policyholders. The misreporting of premiums on the UWIC and UWLIC annual statements grossly distorts the actual business being conducted by these companies in Minnesota. The amount misstated for UWIC in 1996, \$7,200,816.00 (reported as group premiums rather than individual premiums), constitutes 25.75% of the total premiums received in Minnesota for 1996 for UWIC.^[27]

An examination of the UWIC and UWLIC annual statements for 1996 and 1997 indicates neither is doing any individual health insurance business in Minnesota. Those misstatements are material to the Department's legitimate oversight function of insurance sales in Minnesota. Regardless of the figure used (e.g. \$7 million or 25%, for UWIC in 1996) the figure is material as a matter of law.^[28] There is no genuine issue of material fact regarding these inaccuracies and they constitute violations of Minn. Stat. § 45.027, subd. 7(3). The Department is entitled to summary disposition of Count 10.

Respondents' motion to limit evidence is based on the perception that additional documentary evidence would be required by the Department to prove the number of violations cited. As the foregoing analysis demonstrates, no further documentary evidence is required by the Department to support the claims for which summary disposition is recommended. In all other respects, the motion is premature, since discovery in the form of depositions has not yet been conducted. Additional relevant evidence may be discovered and should not be precluded from use in these proceedings.

There being no genuine issues of material fact as to Counts 1, 4, 7, and 10, and the Department having demonstrated that it prevails under the law on those Counts, the Department is entitled to summary disposition of in its favor on Counts 1, 4, 7, and 10. The Respondents have not demonstrated that they are entitled to summary disposition on any Count. Therefore the Administrative Law Judge recommends that summary disposition be GRANTED to the Department on Counts 1, 4, 7, and 10, and DENIED to the Respondents on Counts 7, 8, and 9. The Respondents' motion to limit evidence is DENIED.

The issues involved in Counts 1, 4, 7, and 10 form the foundation for the remaining counts and their resolution will likely advance the ultimate termination of the hearing. Therefore, it is appropriate to certify the recommendations for summary disposition at this time rather than first completing the hearing on the remaining issues.^[29]

S.M.M.

^[1] Second Amended Notice of and Order for Hearing.

^[2] An *in camera* inspection of the documents was performed and these issues were resolved at the motion hearing.

^[3] Minn. R. 1400.5500 K.

^[4] *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63,66 (Minn. App. 1985); Minn. R. Civ.P. 56.03.

^[5] See Minn. R. 1400.6600

^[6] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).

^[7] See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

^[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

^[9] *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

^[10] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[11] *Id.*

^[12] *Id.*

^[13] Warch Supplemental Affidavit, Exhibit A. The list originated from Respondents.

^[14] Warch Affidavit, Exhibit A.

^[15] Molstad Affidavit, Exhibit D.

^[16] Molstad Affidavit, Exhibit F.

^[17] Supplemental Affidavit of Stephen K. Warch, Exhibit A.

^[18] Gross Affidavit, Exhibit B (Bate stamp 00633).

^[19] See Minn. Stat. § 60A.08.

^[20] *DHL, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997).

^[21] Minn. Stat. § 62A.01.

^[22] Minn. Stat. § 60A.06, subd. 1(5)(a).

^[23] In any event, the filing requirement of Minn. Stat. § 62A.02, subd. 1, expressly applies to health plans under Minn. Stat. § 62A.011 **and** policies of accident and sickness insurance under Minn. Stat. § 62A.01. Exclusion from the definition of "health plan" does not change the filing and approval requirements imposed on dental coverage only policies.

^[24] Respondents also argued that the form to be filed did not have separate lines for individual and group health insurance premiums collected. Respondents identified Schedule T (attached to the Prochnow Affidavit) to support this argument. Schedule T is not the correct form for the required annual statement. The required annual statements have separate lines for individual and group premiums on accident and health insurance. See LeTourneau Affidavit, Exhibits A-D.

^[25] Respondents have argued selective enforcement and various constitutional violations are implicated in Count 10. These arguments are based on the presumption that the misstatements on the annual statements are immaterial. Respondents' Memorandum of Law in Opposition to Department's Cross-Motion on Count 10, at 9. Since the misstatements are material as a matter of law, these arguments must fail.

^[26] Prochnow Affidavit, at 1-2. The Affidavit maintains that the percentages of misreported premiums are percentages of the total premiums "in Minnesota." The only calculation that arrives at the 2% and .5% figures is limited to the misreporting of UWLIC premiums on the UWIC annual statement. For 1996, the \$129,953 collected by UWLIC is divided by the total reported by UWIC, \$27,997,447, for a result of .46 percent. For 1997, the \$552,804 collected by UWLIC is divided by the total reported by UWIC, \$30,396,792, for a result of 1.8 percent. These calculations do not compare the misreporting on each companies' own statement between individual and group plans.

^[27] LeTourneau Affidavit, Exhibit A.

^[28] For 1997, UWIC collected over \$9 million in individual policy premiums, or over 30% of the total insurance premiums collected by UWIC in Minnesota. LeTourneau Affidavit, Exhibit C. None of that \$9 million was correctly reported as individual policy premiums. For UWLIC in 1996, the totals for individual policies are \$129,953.00, or 27.3% of UWLIC's premiums. LeTourneau Affidavit, Exhibit B. In 1997, UWLIC claimed no premiums were received for either individual or group coverage when, in reality, \$552,804.00 in premiums had been received. LeTourneau Affidavit, Exhibit D. For an insurance company to collect one-half million dollars in premium and failing to report that fact is, as a matter of law, a material misstatement.

^[29] See Minn. Rule 1400.7600.